IN THE SUPREME COURT OF FLORIDA

THEODORE CHRISTOPHER HARRIS,	:	
Petitioner,	:	Case No. 66,523
v.	:	
LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida, and RICHARD DUGGER, Superintendent, Florida State Prison at Starke, Florida,	:	
Respondents.	:	

REPLY IN SUPPORT OF PETITION
FOR WRIT OF HABEAS CORPUS
AND FOR OTHER RELIEF

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Preliminary Statement

We submit this Reply to the Response of the State of Florida to Mr. Harris' Petition for a Writ of Habeas Corpus and For Other Relief. Most of the issues raised in the State's Response are adequately addressed in our original Petition and we stand by our position firmly. Indeed, the State chose not to respond directly to much of what we said there. A Reply is nevertheless appropriate, because the State has missed the essential thrust of many of our legal arguments and has declined to answer most of our factual ones.

The issues presented by our Petition are straightforward. The affidavit that supported Mr. Harris' arrest by Warrant was riddled with exaggerations, misstatements and outright falsehoods. The cumulative flaws in that affidavit are so gross and so material that they must be viewed, as a matter of law and of plain common sense, as a deliberate attempt to mislead Judge Arthur Winton, of the Eleventh Judicial Circuit in and for Dade County, to whom the affidavit was offered. No intervening circumstances after Mr. Harris' arrest on the Warrant alleviated the taint, and the Court below erred in denying his motion to suppress his confession. That confession, as we showed in our Petition, was the keystone of the State's case against Mr. Harris. Without it the arch must fall.

Despite the central and dispositive nature of the issue raised by our Petition, this Court was never afforded the opportunity for a thorough review of the merits of Mr. Harris' Fourth Amendment claim. That did not happen because the issue was waived at trial, as in State v. Mayo, 87 So.2d 501, 503 (Fla. 1956). As we showed in our Petition, the question was fairly presented to the trial court. Neither was the issue waived in the direct appeal. See Appendix to our Petition, Exhibit D, at 21-28. But, as we showed in our Petition, the manner and content of the

appellate presentation of this claim were so egregiously wanting as to "undermine confidence in the fairness and correctness of the outcome". Johnson v. Wainwright, No. 66,445 (Fla. January 28, 1985), at _____. The Writ should accordingly issue to permit the first meaningful scrutiny of the Trial Court's erroneous ruling on this crucial issue, and ultimately, to reverse the error below.

The State's Response Fails to Meet Us on the Merits

That the State wishes to avoid thorough judicial review of the Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed2d 667 (1979) issue presented by this case is hardly surprising in view of the testimony, largely uncontested, that we summarize in our Petition at pp. 3-24. But the attempt at microscopic compartmentalization of the flaws in the Affidavit that informs the State's Response must be rejected as inconsistent with all of the available case law. See our Petition, at 28-34. Nowhere is the crucial significance of the cumulative falsity of the Affidavit even addressed by the Response.

The State's Response also ignores the context in which this Affidavit was prepared and executed. At the time the Affidavit was prepared, the investigation had disclosed no eyewitnesses, fingerprints or conclusive serological or other physical evidence. Detective Parmenter did not even seek a warrant until nearly three weeks after the crime and two weeks after Mr. Harris had gone home to Jacksonville. The Affidavit was prepared with the assistance of at least one (and perhaps more than one) Assistant State Attorney. In short, it was far from a hastily prepared document.

Perhaps if the Affidavit had contained but one misstatement or even two or three, a Court might properly conclude, as the Trial Court did, that the inaccuracies were the product of simple negligence, despite their sworn character. Here, however,

virtually all the material allegations contained in the Affidavit were inaccurate, misleading, subtly deceptive or outright falsehoods. Conversely, none of the material allegations of the Affidavit was unqualifiedly true. The truth is that one simply cannot read this Affidavit cumulatively and in context and reach any conclusion other than that the official dissembling was intentional.

The State's Response hardly allays fears of a miscarriage of justice in the selected instances in which it comes to grip with the merits: it goes instead some considerable way towards showing just how inaccurate and misleading the Affidavit really was. We limit our Reply, point by point, to the few counterarguments advanced in the Response on the merits:

[3] "The suspect, Theodore Harris, was released one month before the murder from the Florida State Prison System for armed robbery and was a distant relative of the victim, Essie Daniels." The State does not deny that the Affidavit misstates both Mr. Harris' prior criminal record and his parole status. Instead, the State contends only that these misstatements have no effect on probable cause and, even if they did, were not recklessly or intentionally made by Detective Parmenter.

It is a difficult argument to contend that the misstatements in Sentence [3] were not materially misleading to Judge Winton. There can be no doubt that the Detective's false representation that Mr. Harris had a prior conviction for armed robbery and had been out of prison for only one month was included in the Affidavit in order to enhance the probable case. The Affidavit was drafted in connection with a crime of violence and robbery, committed with a weapon. The truth, which was that Mr. Harris had been convicted of a 1977 purse-snatching without a weapon, and had been released on parole for four months, would perhaps not have even been relevant and would certainly have been less persuasive.

The State's further claim that the Officer did not know the statements in sentence [3] were false (Response, at 8) is either meritless or inexcusable, or both. Mr. Harris was the first and only suspect the investigator had. To suggest that in the sixteen days before the officer applied for the warrant he never once checked Mr. Harris' prior criminal record through official police sources passes belief. Such a record check is standard operating procedure in the remotest rural police precinct in the country in connection with traffic stops; it is surely the universal norm in Dade County in murder investigations.

It is simply not credible that the officer was ignorant of Mr. Harris' actual record. But the State's Response goes further still -- it suggests that the detective was somehow entitled to present the false averment about Mr. Harris' prior record to Judge Winton, without checking it, because the husband of Mr. Harris' sister-in-law might have told the detective about it. In the absence of exigent circumstances, and here the circumstances were almost leisurely, this is a proposition that surely falls of its own weight.

[4] "Suspect Theodore Harris, according to his room mate, Lionel Cook, knew that the victim, Essie Daniels, came home every Saturday night from the Church Bake Sale with a large amount of cash." Although the State devotes much effort in its Response to supporting this allegation (Response at 8-13), the attempt is unavailing. The Response is largely devoted to the proposition that the detective might legitimately have inferred what he swore to in the Affidavit from other sources, despite the Detective's own deposition testimony. Such a claim exposes the weakness of the State's position. The officer's role in an affidavit is not to swear as fact to that which he might suspect by inference -- and particularly not to do so by falsely attributing to the words of an independent witness his hypothesis that Mr. Harris knew that

Essie Daniels had large amounts of cash every Saturday night. To the extent that inference is called for, Judge Winton was fully capable of supplying it. Although the false portions of sentence [4] are by no means the most significant misstatements of fact in the affidavit, they were unquestionably unsupported in the record. As even Detective Parmenter conceded, he never discussed with the Cooks the amounts of money that Mrs. Daniels had. Under the circumstances, Parmenter's sworn representation that Lionel Cook told him "Mr. Harris knew....Essie Daniels came home every Saturday night from the Church Bake Sale with a large amount of cash" is simply untrue.

[5] "Blood samples from the murder scene were compared with the suspect, Theodore Harris, and the results were highly consistent." The State makes no direct response to this highly significant falsehood, preferring to run together sentences [5], [6] and [7] for a cumulative reply. In an attempt to shore up this portion of the Affidavit, found to be false by Judge Scott, the State quotes the testimony of Kathy Nelson, the serologist, to the effect that blood found at the scene was consistent with "stains originating from inside the subject's clothes which at the time, I was deducing was, in fact, the subject's blood and, therefore, I felt that was definitely cause for arrest warrant." (Response at 13-14)

The quoted portions of Ms. Nelson's testimony, however, are proof of our pudding. As we have shown in own Petition, when she performed the serological tests referred to in the Affidavit she had no sample of Mr. Harris' blood to test, the unequivocal assertion of sentence [5] to the contrary notwithstanding. Instead she had blood stains from clothes and other articles taken by the police from the crime scene, which may or may not have belonged to Mr. Harris and which may or may not have had Mr. Harris' blood on them. Her efforts, like those of any forensic

serologist, were directed at establishing a benchmark against which she could later test the blood of Mr. Harris (or any other suspect). Those comparisons had not yet been performed for the simple reason that no sample of blood from Mr. Harris had yet been taken. Instead of presenting the truth, the detective told the Magistrate that the sample been taken from Mr. Harris, which was false, and further suggested that the samples matched, which was also false. No amount of rescuscitation can help this portion of the Affidavit.

[6] "The examination of the blood samples at the scene was compared with a bloody towel from suspect's car which was recovered on March 22nd." The State now concedes--as it must--that the car referred to in sentence [6] as the suspect's car was in truth not Mr. Harris' car, and that the detective knew it at the time. It argues, however, that this misstatement did not have any effect on the issue of probable cause. It also submits, as a matter of grammatical construction, that Judge Winton did not (or should not) have drawn the inference from this sentence that the nonexistent car was "recovered" by the police.

As we show in our Petition, neither the car nor the towel had to be "recovered" by the police. Moreover, one can obviously read the sentence to mean that Mr. Harris' car had to be recovered. We do not charge the detective with bad grammar in the form of an unclear antecedent -- it is bad faith that concerns us. In view of the outrageously false assertion in sentence [15] that Petitioner had "vacated his residence and ha[d] not been located," the State is in no position to argue that the official affidavit did not intend to suggest that it was the vehicle which was recovered because Mr. Harris was in flight. At the very least, Judge Winton would have been fully justified in resolving the grammatical ambiguity to Mr. Harris' detriment. That such a resolution files in the face of the facts is the gist of the problem.

[7] "The examination was conducted by Kathy Nelson of the Public Safety Department Crime Lab and her findings were that only a black male could have left the blood at the scene, and only 6 percent of the black male population could have left the identical sample on both the towel and the other items found at the scene." There is, of course, no debate over this sentence. The assertion that Ms. Nelson had narrowed the range of possible suspects to 6 per cent of the black male population was totally false, as the detective later admitted and the Trial Court later found.

Were this the only misstatement in the Affidavit, the Trial Court might properly have held--as it did--that it was an innocent mistake. When one examines this sentence in context and in light of the numerous other false statements contained in the Affidavit, however, one arrives at a far different conclusion: not even the cold laboratory evidence was safe from manipulation before submission to Judge Winton.

[11] "The 'facts' given in the alibi were not verified by subsequent investigation, and one witness contradicted the time frame given by the suspect." As we show in our Petition, this sentence grossly overstates the extent of Parmenter's efforts to verify Mr. Harris' alibi (those efforts were minimal) and exaggerates the clarity with which Greg Williams contradicted the time frames given by Mr. Harris (Mr. Williams' recollection of the events of March 22-23, especially his recollection of times, was imprecise and seriously flawed).

[14] "The subject had previously been to the residence of the victim, and was familiar with its layout, as well as the regular Saturday night (March 21st) existence of cash quantity in the house". The State apparently agrees that Parmenter's assertion in this sentence that Petitioner was "familiar with the layout" of the victim's home is unsupported by anything said to Parmenter by the Cooks or anyone else.

[15] "As soon as the subject left the hospital, he vacated his residence and has not been located since." Of all the falsehoods and errors in the Affidavit, this was the most important. Parmenter's allegation of flight was, if true, surely the single most damaging piece of evidence Parmenter had at the time he swore to the Affidavit. Yet the record shows that this allegation was false and, more important, that Detective Parmenter knew it was false. The State here makes no response on the merits (a timorous posture, but clearly a prudent one).

We Have Clearly Established Ineffective Assistance of Counsel

Though armed with a clear and dispositive claim of error, Mr. Harris' appointed appellate counsel devoted only seven and one-half pages of his brief to the issue. He never pointed out most of the inaccuracies contained in the Affidavit; he missed the significance of the careful and detailed analysis of the Affidavit's cumulative deficiencies that we presented in the Petition. We invite comparison between the fragment of the Brief dealing with this issue and pp. 3-23 of our Petition, not because we share the State's ironically expressed belief that our efforts are "heroic", Response, at 18, but because this Court is entitled to and must ask how this issue so grievously miscarried on the direct appeal.

But the deficiencies did not end with the Brief. Appointed appellate counsel, having identified if not argued the point, then rested upon his oars for the duration. He filed no reply brief, thus leaving unopposed the State's inaccurate and misleading factual contentions concerning this issue. Despite the compelling nature of the Fourth Amendment violations here, he failed even to mention the issue in his oral argument to this Court. Worse still, counsel inexplicably failed to include in the Record Appendix the crucial deposition testimony, of record before Judge Scott, that established that the warrant affidavit was

knowingly and materially false.[1] He thus prohibited this Court from exploring the claim on its own even if it had been able or disposed to do so. Short of simply not presenting the claim at all, counsel could hardly have done less to advance Mr. Harris' most important contention.

In reply, the State contends in essence (at 2-5) that the Petition should be rejected out of hand since the Fourth Amendment claim "was raised" on direct appeal. The State's position, in essence, is that appellate counsel adequately discharged his responsibilities to Mr. Harris as a matter of law by raising some Fourth Amendment issue as a point in his brief. By this reasoning, a brief that included a Table of Contents but no factual argument or legal analysis would have served as well. Such formalism of approach wholly misperceives the tasks allotted by the Sixth Amendment to appointed counsel, and the extent to which this Court must rely upon counsel in order to do justice.

In Evitts v. Lucey, 36 Crim. L. Rep. (BNA) 3109 (U.S. January 21, 1985), discussed in our Petition, the Supreme Court held that appellants in criminal cases are constitutionally entitled to effective counsel on appeal. In so holding the Court made plain that nominal representation on appeal is not enough to satisfy the constitutional command. Instead it stated that "a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all." 36 Crim. L. Rep. at 3112 (Emphasis added). Thus, the petitioner in

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1. We note that the State does not oppose our application for Augmentation of the Record on Appeal to include the testimony contained in our Appendix. Indeed, the State's Response perforce refers on numerous occasions to the deposition testimony in our Appendix (but not in the Record on Appeal) to support its position. No more telling illustration could be devised to support our contention that Mr. Harris' Fourth Amendment claim simply cannot be fairly assessed by either side without extensive reference to the testimony omitted by appointed appellate counsel from the Record on Appeal.

Evitts was granted habeas corpus relief since his appellate counsel had failed to comply with Kentucky Appellate Rules and thereby placed his client in virtually the same position as if he had had no counsel at all. Similarly, in this case, Mr. Harris is in no better position with respect to his Fourth Amendment claim than if he had been unrepresented on appeal. Although the Franks claim was raised by counsel, the presentation of the claim was so anemic that the claim might as well have been omitted altogether. The grossly inadequate performance in this case is not what the Supreme Court in Evitts meant by the constitutional guarantee of "effective representation".

Although this Court has held that the writ of habeas corpus may not be used merely to secure a second or substituted appeal, it has often recognized, even before Evitts, that the writ must issue where (1) appellate counsel's performance deviated from the norm or fell outside the range of professionally unacceptable performance and (2) counsel's failure caused prejudice to the appellant by compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome. See, e.g., Johnson v. Wainwright, supra. In Johnson, this Court denied the writ holding petitioner's appellate counsel could not be faulted for failure to raise as an issue on appeal the petitioner's exclusion from portions of his trial, since the petitioner had, on the undisputed record below, waived his right to be present. Here, unlike Johnson, in which there was really nothing for counsel to claim as error,[2] there was a solid and dispositive claim which was so poorly and incompetently raised on

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2. Specifically, petitioner in Johnson contended that he should have been present when a defense psychiatrist was testifying during the penalty phase of his trial. The record below, however, established that petitioner's decision not to be present was part of a prior arrangement with the petitioner's psychiatrist who preferred that the petitioner not be present.

appeal that the fairness and correctness of this Court's affirmance of the conviction is seriously in doubt.

The Sixth Amendment guarantee of effective assistance of appellate counsel requires that appellate counsel, to be effective, must do more than merely identify an issue -- especially an issue so central and dispositive as the issue involved here. Effective and vigorous appellate advocacy mandates a thorough marshalling and analysis of the facts and applicable law and forceful presentation of the claim on brief and at oral argument. The true test of a violation of the right to effective assistance of counsel is when, as here, we show that the underlying claim was meritorious and dispositive, and this Court had no opportunity to do it justice.

That counsel did not put in the Record Appendix the deposition testimony that shows this allegation was false; that counsel barely mentioned this subject in his brief; that no reply was filed; and that counsel wholly ignored the issue at oral argument represents a complete failure of appellate advocacy. There can simply be no meaningful appeal of Petitioner's Fourth Amendment claim without the kind of careful and detailed treatment of this issue that is here presented for the very first time.

Conclusion

This Court erred in affirming the Trial Court's denial of the motion to suppress the arrest. We believe it erred because Appellate Counsel failed to present in an effective manner the record facts and law that support the claim. That failure cannot be judged, as the State does in its Response, by simply comparing the Table of Contents of Appellant's Brief with the sub-headings in our Petition. It can only be judged on the merits of the case itself. Those are clear; so too was the dereliction. This case presents precisely the kind of egregious circumstances for which the Writ of Habeas Corpus was intended. The Writ should issue and the conviction and sentence should be reversed.

Respectfully Submitted,

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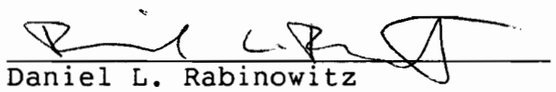
Dated: April 9, 1985

Certification of Service

I hereby certify that a true and correct copy of the foregoing Reply In Support of Petition for Writ of Habeas Corpus and For Other Relief was served upon the Honorable Jim Smith, Attorney General of Florida, The Capitol, Tallahassee, Florida, and upon Julie Thornton, Esq., Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2d Ave., Room 820, Miami, Florida, this 9th day of April 1985.



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